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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GARY WILLIAM WASHEBEK, Defendant and Appellant.	F059291 (Super. Ct. No. VCF219964) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Kathryn T. Montejano, Judge.

Barbara Coffman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans, Deputy Attorney General for Plaintiff and Respondent.

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This is an appeal from a judgment (order for probation) after defendant and appellant Gary William Washebek pled no contest to one felony count of receiving stolen property. (Pen. Code, § 496, subd. (a).) Defendant contends the trial court erred in

denying his motion to suppress evidence. (See Pen. Code, § 1538.5, subd. (m).) We affirm the judgment.

Facts and Procedural History

A. *Case No. VCF62376-00*

Our summary of the facts in this case must begin with a digression. On January 18, 2001, defendant pled no contest to one felony count of grand theft (Pen. Code, § 487, subd. (a)) in case No. VCF62376-00. On February 15, 2001, the court imposed and suspended the "upper term" of two years imprisonment and placed defendant on three years of formal probation.

On or about August 6, 2004, almost 42 months after defendant began probation, the court "revoked" his probation and remanded him into custody. Appearing with counsel, defendant on September 17, 2004, admitted the violation of probation. On November 5, 2004, the court reinstated probation for a period of five years.

On February 8, 2006, defendant, again appearing with counsel, admitted a further violation of probation. The court reinstated defendant's probation and extended probation for five years from February 2, 2006. On June 29, 2009, defendant appeared for arraignment for violation of probation stemming from the charges in the present case.

B. *The Present Case (VCF219964)*

Visalia police officer Michael Carsten knew defendant, having had contact with him on four prior occasions. (None of the contacts resulted in arrests.) Carsten believed defendant was on probation for a theft-related offense and had assisted with a probation search of defendant's home within the past two years.

On March 26, 2009, Carsten and his partner drove by a pickup truck parked by the side of the road. Defendant was standing behind the truck and appeared to be examining the contents of a large plastic bag. Carsten turned back to investigate further. By the time he made the turn, defendant had entered the passenger side of the truck and the driver had pulled away. Carsten activated his lights and the truck pulled over.

Carsten called in to the probation department. He spoke to probation officer Ignacio Alcocer. Alcocer told Carsten that defendant was on formal probation, one condition of which required defendant to submit to search by any probation officer or other law enforcement officer. Alcocer went to the scene of the detention to assist Carsten.

Carsten saw that defendant had left the plastic bag by the side of the road. Carsten asked defendant what he was doing with the bag. Defendant said he was just looking at it. While his partner detained defendant and the driver, Carsten retrieved the bag. Looking inside, he discovered other bags containing two purses, a driver's license, and business cards. The officers contacted the person identified on the driver's license and business cards. She reported she had been the victim of a vehicle burglary the day before. She said the purses and identification had been taken in the burglary, together with various gift cards and other items. Carsten arrested defendant.

In the meantime, Alcocer arrived at the detention scene and assisted in a search of the surrounding area, unsuccessfully looking for a mobile telephone the victim apparently had reported stolen in the burglary. Alcocer, the two police officers, defendant, and the truck driver all went to the defendant's home, a room in a mobile home. Carsten searched the room and found several gift cards hidden beneath a drawer in a bedside table. Later the same day, Carsten met with the burglary victim, who identified the recovered property as hers.

Defendant was charged by felony complaint with one count of receiving stolen property. The complaint also alleged three probation-limiting prior convictions. (See Pen. Code, § 1203, subd. (e)(4).)

Defendant filed a motion to suppress evidence, which was heard at the same time as the preliminary hearing. (Pen. Code, § 1538.5, subd. (f).) Defendant contended only that the warrantless probation search, while otherwise permitted by the terms of defendant's probation, was undertaken for purposes of harassment of defendant or for

arbitrary or capricious reasons. The prosecution relied on defendant's conditions of probation to justify the detention and the search of defendant's home. The court denied the suppression motion and held defendant to answer.

Defendant was arraigned on the information on June 29, 2009.

C. *Case No. VCF62376-00 Revisited*

On July 28, 2009, on defendant's motion, the court dismissed the alleged violation and terminated defendant's probation nunc pro tunc as of February 15, 2004, that is, three years from the original grant of probation.

D. *Renewal of the Suppression Motion in the Present Case*

By motion filed August 7, 2009, defendant renewed his motion to suppress evidence in the present case. He contended his probation in case No. VCF62376-00 ended as a matter of law on February 15, 2004. Accordingly, the detention without reasonable suspicion of criminal activity and the warrantless search of his home were illegal. The police were not entitled to rely on the good-faith exception to the exclusionary rule (see *United States v. Leon* (1984) 468 U.S. 897) because the error concerning his probationary status arose from the probation department's (and, therefore, law enforcement's) violation of its record-keeping obligation under Penal Code section 1203.10. The court denied the suppression motion, concluding that the error was judicial error in extending defendant's probation, not record-keeping error by the probation department.

Subsequently, defendant entered a plea of no contest in the present case and was placed on probation for three years. Defendant filed a timely notice of appeal.

Discussion

Defendant raises two issues on appeal. First, he contends the initial detention was unduly prolonged in violation of the Fourth Amendment. Second, while acknowledging that the police and probation officers in this case actually relied on records showing that defendant was on probation even though the period of probation had expired, defendant

contends the "prosecution failed to meet its burden of proof and demonstrate that the source of the error concerning the termination of … probation [in] 2004 was other th[a]n the probation department. The good faith exception to the exclusion of evidence following a violation to the [F]ourth [A]mendment does not apply here." Neither of these contentions has merit.

A detention, whether an investigative stop pursuant to *Terry v. Ohio* (1968) 392 U.S. 1 or pursuant to a condition of probation, may violate the Fourth Amendment if the detention is unreasonably prolonged. (*United States v. Sharpe* (1985) 470 U.S. 675, 686-688.) A detention valid at its inception is not permitted to extend beyond the time reasonably necessary to accomplish the investigation that prompted the detention. (*Florida v. Royer* (1983) 460 U.S. 491, 500.) Defendant contends that time, in the present case, is limited to the time necessary to write a citation for the infraction of littering.

Defendant did not raise this issue either in his original suppression motion or in the renewed suppression motion. Accordingly, it is not surprising that the prosecutor did not dwell on evidence concerning the length of the detention or the reasons for delay between the detention and defendant's arrest. Because the issue was not raised below and rests upon facts not established in the record, the claim is waived on appeal. (*People v. Williams* (1999) 20 Cal.4th 119, 136.)

In any event, the record shows that the detention was not unduly prolonged. Carsten testified his purpose in stopping defendant was to investigate possible littering, that is, whether defendant had dumped the trash bag along the roadside. Defendant, upon being questioned about the bag, denied it was his; he claimed he had simply stopped to examine the bag and then had left it where he found it. Under those circumstances, it was incumbent upon Carsten to determine whether anything in the bag would establish or disprove defendant's claim—in particular, whether items in the bag might show that it was defendant's trash or someone else's. The detention was extended long enough for

Carsten to return to the bag and briefly examine its contents. (See *People v. Russell* (2000) 81 Cal.App.4th 96, 102 [facts discovered during detention may provide basis to prolong for further investigation].) At that point, the contents of the bag—items unlikely to have simply been discarded as trash—gave ample cause to detain defendant while the apparent owner of the items was contacted. The detention was not prolonged beyond the time necessary for reasonable investigation.

Defendant's other contention on appeal is that the prosecution failed to establish in the trial court that the extension of probation beyond February 2004 was judicial error rather than law-enforcement error. The distinction in question, established in *People v. Willis* (2002) 28 Cal.4th 22 and other California cases, was the basis of defendant's argument in the trial court. In those cases, California courts held, based on language in *Arizona v. Evans* (1995) 514 U.S. 1, 16, that application of the exclusionary rule was not justified when police relied in good faith on court records, but that the exclusionary rule continued to be applicable when the erroneous records were generated by law enforcement. (See *People v. Ferguson* (2003) 109 Cal.App.4th 367, 370.)

Subsequently, however, the United States Supreme Court rejected this distinction between law-enforcement error and errors in court records. Thus, in *Herring v. United States* (2009) 555 U.S. ___, ___ [129 S.Ct. 695, 704], the court held that the good-faith exception to the exclusionary rule precludes suppression of evidence when police rely in good faith on negligently maintained police records. Only "[i]f the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, [would] exclusion … be justified under our cases should such misconduct cause a Fourth Amendment violation." (*Id*. at p. 703.)

In the present case, there was no claim in the trial court that the probation office intentionally misled the court in 2004 and 2006 to extend defendant's probation after such probation had expired. As with the undue-prolongation claim, the failure to make

this claim in the trial court prevented the prosecution from producing evidence to refute the claim and the claim on appeal is waived. (*People v. Williams, supra,* 20 Cal.4th at p. 136.) In any event, the fact that the error escaped notice by defendant, his attorney, and the court on at least the two occasions that resulted in orders extending probation, leads us to conclude that application of the exclusionary rule in this case would not serve in any way to curb the type of Fourth Amendment violations that are the target of the exclusionary rule. (See *Herring v. United States, supra*, 555 U.S. at pp. __-__ [129 S.Ct. at pp. 699-704].) The evidence seized in this case in good-faith reliance on records establishing that defendant was on probation was admissible.

Disposition

The judgment (order for probation) is affirmed.

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Detjen, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Kane, J.